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IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF CALIFORNIA

NATIONAL CITY BANK OF INDIANA, and	)	Civil Action No. S-03-0655 GEB JFM
NATIONAL CITY MORTGAGE CO.,	)	(Related to Case Nos. S-03-0157 GEB JFM
	)	and S-03-0256 GEB JFM)
Plaintiffs,	)	
	)	MEMORANDUM OF POINTS AND
vs.	)	AUTHORITIES IN OPPOSITION TO
	)	PLAINTIFFS' MOTION FOR
	)	PRELIMINARY INJUNCTION
DEMETRIOS A. BOUTRIS, in his official	)	
capacity as Commissioner of the California	)	Hearing Date: May 5, 2003
Department of Corporations,	)	Hearing Time: 9:00 a.m.
	)	Hearing Location: Courtroom 10
Defendant.	)	
	)	<b>Hearing Requested</b>
	)	[15 minutes each side]

1 Defendant, Demetrios A. Boutris, in his official capacity as California Corporations  
2 Commissioner (“Commissioner”) hereby submits his Opposition to plaintiffs’ request for the  
3 issuance of a Preliminary Injunction.

#### 4 INTRODUCTION

5 National City Mortgage Co. (“NCMC”), while openly in violation of California law, asks this  
6 Court to enjoin the California Corporations Commissioner from enforcing or taking any action to  
7 enforce the CRMLA. The plaintiffs’ motion seeks to prohibit the Commissioner’s statutory  
8 authority, presumably including his ability to administratively revoke NCMC’s license for violating  
9 the law, effectively allowing NCMC to continue claiming it is licensed by the State of California. At  
10 the same time, National City Bank of Indiana (“National City Bank”) and NCMC ask this Court to  
11 reach a conclusion that the CRMLA is preempted by overreaching federal regulations promulgated  
12 by the Office of the Comptroller of the Currency (“OCC”).

13 National City Bank and NCMC cannot demonstrate a likelihood of success that would  
14 warrant the issuance of a preliminary injunction on any basis. There is no statutory authorization by  
15 Congress allowing the OCC to expand its jurisdiction over state-chartered corporations by  
16 designating them as operating subsidiaries of a national bank and then preempting all state laws,  
17 including consumer protection statutes such as the CRMLA. Further, NCMC has even failed to  
18 demonstrate that it is an operating subsidiary and when it allegedly became so.

19 Finally, on its face, California Financial Code section 50204(o) does not expressly limit the  
20 rate or amount of interest so as to bring it under the preemptory provisions of the Depository  
21 Institutions Deregulation and Monetary Control Act of 1980 (“DIDMCA”). Rather, the California  
22 statute regulates the number of days a lender may charge consumers interest prior to the recording of  
23 their mortgage or deed of trust. As such, there is insufficient evidence and authority to support the  
24 issuance of a preliminary injunction.

25 National City Bank and NCMC have failed to prove that they will suffer irreparable harm if  
26 required to comply with the CRMLA. NCMC will not lose significant income during the pendency  
27 of this matter without the injunction; it will, however, lose the unfair business advantage it now  
28 enjoys over licensees who are required to comply with the California consumer protection laws.

1 Further, National City Bank cannot demonstrate that it has suffered a violation of its statutory or  
2 constitutional rights sufficient to give it standing to bring this action.

3 Because National City Bank and NCMC have not met their burden demonstrating that they  
4 will suffer irreparable harm and that they are likely to succeed at the time of trial and because  
5 National City Bank lacks standing to bring this suit, the preliminary injunction should not be issued.

### 6 **STATEMENT OF FACTS**

7 Following a regulatory examination, to which NCMC submitted as a licensee pursuant to  
8 California law, the California Corporations Commissioner demanded on February 27, 2003, that  
9 NCMC conduct an audit of its residential mortgage loans made in California from August 2000 to  
10 the present. The audit was demanded in order to identify all loans where per diem interest was  
11 charged by NCMC in excess of that allowed under California Financial Code section 50204(o)<sup>1</sup> and  
12 to identify those consumers entitled to a refund.

13 Despite being voluntarily licensed under the CRMLA since 1997 and previously complying  
14 with all licensing, regulatory, supervisory, examination and enforcement provisions of these statutes,  
15 plaintiffs refused to correct the identified deficiencies and to conduct the self audit demanded by the  
16 Commissioner. Accordingly, the Commissioner has instituted proceedings to revoke the CRMLA  
17 license of NCMC. The revocation is based on NCMC's stated intent to not abide by requirements of  
18 the CRMLA. Compliance with these consumer protection laws is a necessary predicate to  
19 maintaining a CRMLA license. Declaration of Yolanda Cherry ("Cherry Decl.") ¶ 8.

20 Alternatively, NCMC could have applied to the Commissioner for a ruling that it is exempt  
21 from the CRMLA under California Financial Code section 50003.<sup>2</sup> NCMC has never made such an  
22 application and has never attempted to surrender its license based upon its alleged status as an  
23

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24 <sup>1</sup> California Financial Code section 50204(o) prohibits lenders licensed under the CRMLA from charging interest for  
25 more than one day prior to the recording of the mortgage or deed of trust. Typically, in California, the deed of trust is  
26 recorded the same day as the loan proceeds are disbursed for the borrowers' use ("loan close"), with loan proceeds being  
27 sent by the lender to title and/or the settlement agent the day before closing. The settlement agents and/or title company  
28 cause the deed of trust to be recorded and take instructions directly from the lender as to the recording. Burns Decl.,  
paragraph 11. Financial Code section 50204(o) does contain an exception when the borrower affirmatively requests, and  
the lender agrees to, funding on a Friday or a day prior to a holiday, and specific disclosures are given. In those  
instances, a lender may charge interest from the business day prior to recording.

<sup>2</sup> Examples of exemptions include national banks; federal savings associations; wholly owned service corporations of  
national banks and federal savings associations.

1 operating subsidiary of a national bank. Moreover, from July 1997 through March 2003, NCMC  
2 complied with all requirements of the CRMLA, except those provisions complained of in the  
3 revocation action. Declaration DiAun M. Burns ("Burns Decl.") ¶¶ 6, 8.

4 During its tenure as a licensee under the CRMLA, NCMC has consistently filed all reports  
5 and paid all assessments required by the CRMLA. Burns Decl.¶ 6. NCMC has also submitted to all  
6 regulatory examinations scheduled by the Commissioner, and responded to all correspondence from  
7 the Commissioner concerning these regulatory examinations without question. In fact, NCMC did  
8 not contest the Commissioner's authority until March 2003 when he continued to demand  
9 compliance with the law. Burns Decl.¶¶ 6, 8.

10 By virtue of its recent claims of preemption in correspondence of March 2003 and through  
11 the lawsuit, NCMC has expressly stated its intention not to abide by requirements of the CRMLA.  
12 Compliance with these consumer protection laws is a necessary predicate to maintaining a CRMLA  
13 license. Cherry Decl.¶ 8. *See also* California Financial Code section 50327. The California  
14 Constitution mandates that the laws of this state be enforced until they are stayed by an appellate  
15 court decision. (*See* Cal. Const. art. III, § 3.5).

16 In addition to submitting to the Commissioner's jurisdiction under the CRMLA, NCMC has  
17 continued to advertise its licensure to potential and existing California consumers. NCMC  
18 advertises through mailings and a website, claiming that it is licensed under the CRMLA, thereby  
19 misleading California consumers into believing that the protections afforded under the CRMLA,  
20 including California Financial Code section 50204(o), would apply to their loans if they seek their  
21 residential mortgage loan through NCMC. Cherry Decl.¶ 7.

22 The amount at issue and the exact number of California consumers affected by NCMC's  
23 violation of the CRMLA is unknown because NCMC has refused to complete the self audit that  
24 would identify the more precise numbers. Further, the number of loans NCMC has made in  
25 California since August 2000 is unsubstantiated. A review of the Loan Reports filed by NCMC for  
26 calendar years 2000, 2001, and 2002 reveal that from August 2000 to December 2000, NCMC  
27 originated 719 loans; from January 2001 to December 2001, NCMC originated 6,846 loans; and  
28 from January 2002 to December 2002, NCMC originated 54,807 loans. This would make NCMC's

1 loan totals for 2000, 2001 and 2002 equal to 62,372. In addition, from August 2000 to December  
2 2002, NCMC brokered 35,476 loans. Even assuming that NCMC is including brokered loans in its  
3 total, NCMC's loan totals for August 2000 through December 2002 equal 97,848, not the 150,000 to  
4 180,000 loans NCMC claims. Burns Decl. ¶ 9.

5 The Commissioner hereby requests the Court deny plaintiffs' motion for preliminary  
6 injunction as these facts establish that plaintiffs have failed to meet their burden of demonstrating  
7 that they will suffer irreparable harm and that they are likely to succeed at the time of trial.

## 8 ARGUMENT

### 9 I. HEIGHTENED STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF MUST 10 BE APPLIED

#### 11 A. Moving Parties Must Satisfy A Heightened Burden When Seeking A 12 Preliminary Injunction Against Government Activity

13 Courts have applied a heightened standard on the moving party when the injunctive  
14 relief is sought "to stay governmental action taken in the public interest pursuant to a statutory or  
15 regulatory scheme." *Able v. United States*, 44 F.3d 128, 130-31 (2d Cir. 1995) citing *Plaza Health*  
16 *Labs, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). In this line of cases, the moving party must  
17 show more than "sufficiently serious questions going to the merits" (also known as the "fair-ground-  
18 for litigation" test). *Able*, 44 F.3d at 130. Where the governmental action is based on a statutory  
19 scheme to protect the public, such as the CRMLA at issue here, plaintiffs must demonstrate (1)  
20 irreparable harm should the injunction not be granted and (2) a likelihood of success on the merits.  
21 *Id.*

22 In *Able*, the Second Circuit Court of Appeals reversed and remanded the case to the  
23 District Court when it found the lower court abused its discretion by issuing a preliminary injunction  
24 based upon the less stringent standard of "sufficiently serious questions going to the merits" rather  
25 than the measure of a "likelihood of success on the merits". *Id.* at 131-132. The court expressly  
26 found that it would be inappropriate for the court to substitute its own determination of public  
27 interest and apply the lesser standard where the government had engaged the democratic process to  
28 produce policy in the name of public interest that was embodied in a statute and implementing

1 regulations. *Id.* The statutory and regulatory scheme in *Able* was the much debated “don’t ask,  
2 don’t tell” policy of the military as related to sexual orientation of its personnel. *Id.* at 130.

3           Likewise, in *Plaza Health Lab, Inc., supra*, the appellate court affirmed the district  
4 court’s refusal to issue a preliminary injunction to prohibit the New York Department of Social  
5 Services from suspending Plaza Health Lab, Inc.’s ability to participate in the Medicaid program,  
6 finding that the lower court properly applied the likelihood of success standard in combination with  
7 the irreparable harm element where the government entity was threatened with being prohibited with  
8 carrying out its statutory duties. *Plaza Health Labs, Inc.*, 878 F.2d at 580.

9           Plaintiffs assert that the Ninth Circuit Court of Appeals has adopted a more lenient  
10 “alternative standard” similar to the standards rejected in *Able, supra*, and *Plaza Health Labs, Inc.,*  
11 *supra*. All three authorities cited in the moving papers are distinguishable. Two of the cases involve  
12 preliminary injunctions against private corporations, not governmental entities, and should be  
13 disregarded as irrelevant. *See International Jensen, Inc. v. Merrasound U.S.A., Inc.*, 4 F.3d 819, 822  
14 (9<sup>th</sup> Cir. 1993), *Sun Microsystems, Inc. v. Microsoft, Corp.*, 188 F.3d 1115, 1119 (9<sup>th</sup> Cir. 1999).

15           Although plaintiffs’ third case cited in support for this alternative standard involved  
16 the Immigration and Naturalization Service, a federal agency, it was decided prior to the *Able* line of  
17 cases. *See National Center for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9<sup>th</sup> Cir. 1984).  
18 The issue of the appropriate standard for a preliminary injunction to be issued against a  
19 governmental entity was not raised, and thus never addressed in the case. *Id.* Further, unlike the  
20 situation presented at bar, a newly promulgated regulation, not a statute or statutory scheme designed  
21 to protect the public, was under attack. *Id.* at 1367. The CRMLA challenged by plaintiffs is a  
22 statutory scheme developed to provide consumer protection in lending transactions and, therefore,  
23 under the rationale as set forth in *Able* and subsequent cases, requires the application of more  
24 stringent burdens before a preliminary injunction will issue.

25           It is instructive to note that a District Court in the Northern District of California  
26 recently followed the heightened standard established by the Second Circuit. *Ft. Funsten Dog*  
27 *Walkers v. Babbitt*, 96 F. Supp. 2d 1021 (N.D. Cal. 2000). There the court acknowledged the  
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1 "alternative standard" as the standard for the Ninth Circuit, but nevertheless held that "[a] strong  
 2 showing or entitlement to a preliminary injunction is required where the moving party seeks to  
 3 enjoin governmental action taken in the public interest pursuant to a statutory or regulatory scheme.  
 4 In such cases, the moving party must establish both irreparable injury and a probability of success on  
 5 the merits." *Id.* at 1032 (cite omitted).

6 Plaintiffs must therefore establish, to the satisfaction of this court, both irreparable  
 7 injury and a likelihood of success on the merits, because they are seeking to stay governmental  
 8 action taken in the public interest pursuant to a statutory or regulatory scheme. As set forth more  
 9 fully below, plaintiffs cannot meet this burden.

10 **B. The Plaintiffs Burden Is Greater Where The Preliminary Injunction Sought**  
 11 **May Be The Equivalent Of Disposing Of An Entire Action**

12 A heavier burden is also placed upon plaintiffs because their request for preliminary  
 13 relief seeks to essentially dispose of the entire action. *Sanborn Mfg. Co, Inc. v. Campbell*  
 14 *Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8<sup>th</sup> Cir. 1993). Plaintiffs seek to enjoin the  
 15 Commissioner's licensing, regulatory, examination and enforcement powers under the CRMLA, and  
 16 to prevent the Commissioner from revoking the CRMLA license of NCMC, or otherwise  
 17 dispossessing NCMC of that license. Plaintiffs are not limiting their action merely to the per diem  
 18 statute. Thus, plaintiffs are seeking to prevail on all issues in the case at this preliminary stage.

19 When the granting of a preliminary injunction may provide full relief, the standard for  
 20 granting the injunction is higher than normal. *Sanborn Mfg. Co, Inc.*, 997 F.2d at 486. "The burden  
 21 on the movant 'is a heavy one where, as here, granting the preliminary injunction will give [the  
 22 movant] substantially the relief it would obtain after a trial on the merits.'" (citation omitted) *Id.*  
 23 "When the district court's order, albeit in the form of a TRO or preliminary injunction, will finally  
 24 dispose of the matter in dispute, it is not sufficient for the order to be based on a likelihood of  
 25 success or balance of hardships. . . the district court's decision must be correct (insofar as possible on  
 26 what may be an incomplete record.). . . ." (citations omitted) *Romer v. Green Point Sav. Bank*, 27  
 27 F.3d 12, 16 (2<sup>nd</sup> Cir. 1994) (emphasis added). *See also Rivera-Vega, Inc. v Conagra, Inc.* 70 F.3d  
 28

1 153 (1<sup>st</sup> Cir. 1995). "When, as in this case, the interim relief sought by the NLRB 'is essentially the  
2 final relief sought, the likelihood of success should be strong.'" (citation omitted). *Id.* at 164.

3 *Romer v. Green Point Sav. Bank* involved bank depositors who sought a temporary  
4 restraining order to stop a stock conversion plan of the bank from going forward. The court found  
5 that the granting of the restraining order would make it impossible for the bank to meet the 45-day-  
6 sale-date required for such a conversion, and thus the temporary restraining order had the effect of a  
7 final injunction. Accordingly, the court held that because the temporary restraining order would  
8 have "the effect of a permanent injunction, we review it in the same manner as we would review  
9 such a final injunctive order." 27 F.3d 12, 16. The court in *Romer* then went on to find that the bank  
10 depositors had not demonstrated "a violation of their rights, no irreparable harm, no likelihood of  
11 success, perhaps not even a fair question for litigation, certainly no balance of hardships tipping in  
12 their direction, and no entitlement to relief." *Id.* at 16.

13 Accordingly, because plaintiffs are seeking to obtain the same relief by their  
14 preliminary injunction motion that they seek to obtain after a trial on the merits, plaintiffs must  
15 demonstrate "(1) a likelihood of success on the merits; (2) the potential for irreparable injury in the  
16 absence of relief; (3) that such injury outweighs any harm preliminary injunctive relief would inflict  
17 [on interested parties] . . .; and (4) that preliminary relief is in the public interest." *Rivera-Vega,*  
18 *Inc.*, 70 F.3d at 164; *accord Sanborn Mfg. Co.*, 997 F.2d at 485-486.

19 As more fully discussed below, plaintiffs have failed to meet this heightened burden  
20 to dispose of the entire matter on Preliminary Injunction.

21 **C. Injunctive Relief Is Inappropriate When The Rights of Nonparties Will Be**  
22 **Affected**

23 The preliminary injunctive relief sought by plaintiffs would adversely affect the  
24 borrowers who were overcharged as well as all other California consumers, who rely upon the  
25 CRMLA for protection. None of the consumers or borrowers are parties to this matter. If granted it  
26 also could adversely impact other persons or officials acting in the name of the People of the State of  
27 California, such as the California Attorney General, none of whom is a party to this action or have  
28 been given any notice of the action by plaintiffs. Further, other licensees under the CRMLA will be



1 unfairly disadvantaged in business by being required to abide by the laws of the State of California  
2 while their competitor, NCMC, is allowed to keep its license but not comply with the same laws.  
3 The Court must consider the effect of the injunction upon nonparties in determining whether to grant  
4 the far-reaching preliminary injunction as requested by plaintiffs. *Publications Int'l, Ltd. v.*  
5 *Meredith Corporation*, 88 F.3d 473, 478 (7<sup>th</sup> Cir. 1996).

6 By way of example, the United States District Court for the District of Nevada  
7 refused to grant a single shareholder a preliminary injunction to prevent corporate officers from  
8 taking actions in furtherance of stock rights they had declared as a dividend to common stockholders  
9 of the company because it would seriously affect the investing public who were not parties to the  
10 litigation. *Horwitz v. Southwest Forest Industries, Inc.*, 604 F.Supp. 1130, 1136 (D.NV 1985). To  
11 allow one shareholder to disrupt the operations of the corporation by way of a preliminary injunction  
12 gave too much power to the allegedly aggrieved party. *Id.*

13 Here, this court should refuse to allow plaintiffs to disrupt the statutory schemes set  
14 forth in the CRMLA to the detriment of California consumers, businesses and other government  
15 agencies without full argument of the issues.

16 Plaintiffs misstate the law and the function of the OCC when they claim that  
17 California and the public will suffer no harm if the preliminary injunction were granted. Plaintiffs  
18 fail to acknowledge that California consumers who obtain loans through NCMC will continue to be  
19 overcharged, as NCMC deems appropriate during the pendency of this lawsuit if a preliminary  
20 injunction were issued. Plaintiffs also disregard the misrepresentation inherent in a court order  
21 allowing NCMC to retain its California licenses, but excusing NCMC from complying with the  
22 underlying statutory scheme designed to protect consumers.

23 Congress did not expressly preempt any law with respect to operating subsidiaries as  
24 further discussed below. *See* Section II, A and B below. While the OCC may continue to regulate  
25 plaintiffs during the pendency of this action, even the OCC makes clear that its regulation is not  
26 based on consumer protection but rather on protecting the safety and soundness of the financial  
27  
28

institutions.<sup>3</sup> Plaintiffs' offer regarding how they plan to make the public whole at a later date if the CRMLA is upheld fails to include interest with the refunds for overcharged customers, and it ignores various other provisions of the CRMLA that exist for the public protection.<sup>4</sup> Finally, plaintiffs improperly seek to enjoin others, including other state officials, from applying the CRMLA and Civil Code section 2948.5, without notice, thus undermining the concepts of due process.

Plaintiffs must meet the higher burden of both irreparable injury and likelihood of success on the merits because they are (1) seeking to stay governmental action taken in the public interest pursuant to a statutory scheme; (2) seeking to dispose of the entire action by preliminary relief, and (3) seeking to adjudicate a matter involving the interests of third parties. Plaintiffs have failed to meet this burden.

## **II. PLAINTIFFS FAIL TO ESTABLISH THEY ARE LIKELY TO SUCCEED ON THE MERITS**

### **A. An Operating Subsidiary Is *Not* A National Bank**

An operating subsidiary is *not* a national bank and should not be granted all the rights and privileges of a national bank. National banks are federally created entities that must enter into articles of association designating themselves as national banks and certifying that they intend to avail themselves of the advantages of the NBA. 12 U.S.C. §§ 21 and 22. In contrast, operating subsidiaries are state-chartered entities. *Cf.* 12 U.S.C. § 21; *but see* 12 C.F.R. § 5.34. No law grants the exclusive regulatory authority over state created entities such as NCMC to the OCC, the agency responsible for overseeing national banks. *See* 12 U.S.C. §§ 1, et seq.

If Congress had intended operating subsidiaries to be the equivalent of national banks, it would have declared its intention and included an operating subsidiary in the very definition of a bank or national bank. Title 12 U.S.C. Section 1813 defines “bank” as “any national bank, State bank, and District Bank, and any Federal branch and insured branch.” But, this definition of “bank” formulated by Congress does not include “operating subsidiaries” of national

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<sup>3</sup> The Commissioner respectfully requests the Court take judicial notice of the letter from the OCC dated January 16, 2003, attached as Exhibit A to the Plaintiffs' Complaint in the related case of *Wells Fargo Bank, N.A. v. Boutris* (Civil Action No. S-03-0157).

1 banks. A court must give meaning to all statutory provisions and interpret the statute consistently  
2 with the structure, legislative history and motivating policies, so as to not make ineffective other  
3 provisions of the statute. *See; United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Bifulco*  
4 *v. United States*, 447 U.S. 381, 387 (1980); *United States v. Fisher*, 58 F.3d 96, 99 (4<sup>th</sup> Cir. 1995).

5 NCMC is a state-chartered corporation and has held such corporate status in  
6 California since 1993. As a separate corporate entity, NCMC has its own identity, assets, liabilities,  
7 and regulatory responsibilities, separate and distinct from those of its parent corporation. Therefore,  
8 National City Bank and NCMC are insulated from each other's liabilities and responsibilities  
9 because "[e]xcept in unusual circumstances, courts will not disregard the separate identity of a  
10 parent and its subsidiary, even a wholly-owned subsidiary." *Securities Industry Ass'n v. Fed. Home*  
11 *Loan Bank Board*, 588 F.Supp. 749 (D.C. Dist. 1984) *citing Labadie Coal Co. v. Black*, 672 F.2d 92,  
12 96 (D.C. Cir. 1982) ("the greatest judicial deference normally is accorded to the separate corporate  
13 entity.") It is undisputed that NCMC is not a bank; it is not a state or federally authorized bank. It is  
14 a state-authorized corporate citizen that engages in residential lending transactions.

15 Nowhere has Congress expressed in the federal banking laws that such a state-created  
16 legal entity is the equivalent of a nationally organized bank. *See* 12 U.S.C. §§ 1, et seq.; 12 U.S.C. §  
17 21, 12 U.S.C. § 24 (Seventh). Yet plaintiffs are asking this court to rule NCMC is entitled to the  
18 same benefits, protections and exclusive oversight as the bank. This interpretation is not supported  
19 by any Congressional mandate authorizing an "operating subsidiary", as a separate legal entity  
20 distinct from a national bank, to be treated identically as a national bank for purposes of regulation.

21 In fact, at least one other District Court concluded that a mortgage company operating  
22 subsidiary of Fleet National Bank was not a "bank" under Section 133 of the Gramm-Leach-Bliley  
23 Act (codified at 12 U.S.C. § 1816), and thus, was subject to shared enforcement of jurisdiction by  
24 the state of Minnesota and Federal Trade Commission regarding telemarketing activities. *Minnesota*  
25 *v. Fleet Mortgage*, 181 F.Supp.2d 995, 1000 (U.S. Dist. Minn. 2001). The court found that although  
26 the mortgage company was an "operating subsidiary" of a national bank it was not "a bank." *Id.* at  
27

28 <sup>4</sup> The CRMLA also requires that licensees maintain adequate staff; maintain records for 3 years; and fund in a timely fashion. It also prohibits unfair or deceptive practices; commingling of trust funds; and untimely closings.

1 999. The court rejected the arguments by both Fleet National Bank and the OCC that the subsidiary  
2 was “effectively an incorporated department” of a national bank. *Id.* at 1000. The court further held  
3 that “[a]llowing the State to enforce the [Telemarketing Sales Rule] against [Fleet Mortgage  
4 Company] will in no way ‘restrict’ the authority of the OCC to regulate national bank operating  
5 subsidiaries just as it has done in the past. The OCC’s insistence that it must have exclusive  
6 jurisdiction over subsidiaries in order to avoid having its authority ‘restricted’ is not persuasive.” *Id.*  
7 at 1001.

8 *Fleet Mortgage* analyzed the issues now before this Court, and (1) recognized the  
9 chartering and regulatory differences between a national bank and a state-chartered corporation  
10 acting as an operating subsidiary of the bank, (2) rejected the OCC’s claim of exclusive regulatory  
11 power over operating subsidiaries of national banks, and (3) refused to defer to the OCC’s  
12 interpretation of the GLBA and the FDIA [Federal Deposit Insurance Act]. *Id.* at 999-1002.

13 NCMC is not chartered or organized as a national bank. *See* 12 U.S.C. §§ 21 et seq.  
14 NCMC is a wholly owned subsidiary of National City Bank. Declaration of Stephen A. Stitle in  
15 Support of Plaintiffs’ Motion for Preliminary Injunction, ¶ 2. Accordingly, where there is no  
16 express Congressional authorization to do so, these two separate and distinct entities should not be  
17 treated as identical under the NBA.

18 Finally, as a state chartered corporation conducting business in California, NCMC is  
19 availing itself of the rights and privileges of a California corporation, yet claiming not to be subject  
20 to California’s laws by way of the OCC’s exclusive regulatory authority over operating subsidiaries.  
21 To treat NCMC the same as a national bank would be to place NCMC in a unique position, giving it  
22 an unfair advantage in the marketplace against other mortgage lenders in California not affiliated  
23 with national banks and, therefore, subject to California’s laws. As a general policy, this result  
24 would be inherently unfair to California businesses and affect a result not contemplated or  
25 sanctioned by Congress.

26 As has been succinctly stated by the district court for the Eastern District of  
27 Pennsylvania, “The National Bank Act, 12 U.S.C. §§ 21 et seq. regulates national banks and only  
28 national banks, which can be identified by the word “national” in their name as required by 12

1 U.S.C. § 22.” *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 687 (E.D. Penn. 1973). NCMC  
2 is not such a national bank.

3 **B. The OCC Lacks Authority To Adopt Regulations Giving It Exclusive**  
4 **Regulatory Powers Over Operating Subsidiaries**

5 By promulgating regulations seeking to regulate operating subsidiaries of national  
6 banks to the exclusion of the states, the OCC is interfering with California’s constitutional  
7 sovereignty under the Tenth Amendment and taking away the state’s powers to regulate and enforce  
8 its laws against state-chartered corporations such as NCMC.

9 “The powers not delegated to the United States by the Constitution, nor prohibited by  
10 it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X.  
11 Article I, Section 8 of the Constitution authorizes Congress to establish national banks and “to enact  
12 legislation for the protection, preservation and regulation of such institutions.” *Clark v. United*  
13 *States*, 184 F.2d 952, 953 (10<sup>th</sup> Cir. 1950). Therefore, a federal statutory scheme over federally  
14 created national banks does not violate the Tenth Amendment. *First Union National Bank v. Burke*,  
15 48 F.Supp.2d 132 (D.C. Conn. 1999).

16 In *First Union*, the Connecticut District Court was presented with the question of the  
17 OCC’s exclusive visitorial powers over national banks and the potential violation of the Tenth  
18 Amendment such exclusivity presented. *Id.* at 148-149. The court found that the NBA and the  
19 OCC’s regulations *properly* promulgated thereunder did not violate the Tenth Amendment because  
20 the NBA “has carved out from state control supervisory authority over these *federal*  
21 *instrumentalities*. *Id.* at 148 (emphasis added). However, as set forth above, NCMC is not a  
22 national bank, but rather a corporate citizen of the state of California. Accordingly, neither Congress  
23 nor the OCC as the regulatory agency responsible for application of the NBA, have the power to  
24 establish and regulate operating subsidiaries of national banks to the exclusion of the states. *See*  
25 *Minnesota v. Fleet Mortgage*, 181 F.Supp.2d 995, 1002 (U.S. Dist. Minn. 2001) (noting that there is  
26 no direct authority establishing the OCC’s exclusive jurisdiction over operating subsidiaries).  
27  
28

1 Further, the OCC has exceeded its constitutional and statutory authority in  
2 promulgating 12 C.F.R. § 7.4006 which, in essence, seeks to preempt state laws as they apply to  
3 operating subsidiaries of national banks.

4 The first question that must be answered in any preemption analysis is whether  
5 Congress intended that federal law or regulation would supersede state law. *Louisiana Public*  
6 *Service Commission v. FCC*, 476 U.S. 355 (1986). As to preemption of state law, the OCC  
7 regulations may only preempt state law “ . . . when and if it is acting within the scope of its  
8 congressionally delegated authority . . . . An agency literally has no power to act, let alone pre-empt  
9 the validly enacted legislation of a sovereign State, unless . . . Congress confers power upon it.”  
10 *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). The OCC can point to no express  
11 delegation of authority.

12 Congress has not defined an “operating subsidiary” in the NBA or the Gramm-Leach-  
13 Bliley Act (“GLBA”). *See generally*, 12 U.S.C. §§ 21 et seq. and 24(a). Congress has not expressly  
14 granted national banks the authority to own or establish operating subsidiaries in the NBA or the  
15 GLBA. The OCC has interpreted Title 12 U.S.C. Section 24 (Seventh) as giving the OCC the  
16 authority to promulgate regulations authorizing national banks to establish operating subsidiaries.  
17 Title 12 U.S.C. Section 24 (Seventh), however, authorizes incidental powers to national banks, not  
18 the OCC. Thus Section 24 (Seventh) does not constitute an express Congressional delegation to the  
19 OCC to preempt state regulation of operating subsidiaries of national banks.

20 There is a long-standing rule designed to aid courts in statutory construction: “. . .  
21 courts must presume that the legislature says in a statute what it means and means in a statute what it  
22 says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The failure of  
23 Congress to define the term “operating subsidiary” or include operating subsidiaries in the statutory  
24 scheme covering national banks must be presumed to be intentional in the absence of language to the  
25 contrary.

26 In fact, the latest comprehensive congressional pronouncement on national banking,  
27 the GLBA, makes no explicit reference to operating subsidiaries or the OCC’s authority to regulate  
28 such entities. *See generally* 12 U.S.C. § 24a; 12 U.S.C. § 24a(g)(3)(A). However, the OCC, which

1 first promulgated its regulation giving national banks the right to establish operating subsidiaries in  
 2 1966, waited until after passage of the GLBA to attempt to expand its exclusive visitorial authority.  
 3 12 C.F.R. § 5.34; 31 Fed.Reg. 11,459 (Aug. 31, 1966).

4 Absent express Congressional authorization for its actions, the OCC has exceeded its  
 5 authority in promulgating regulations governing “operating subsidiaries” and purporting to preempt  
 6 the licensing and visitorial provisions of state law such as the CRMLA. *See generally Chevron*  
 7 *U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

8 **1. The OCC’s General Rulemaking Authority Does Not Support Its**  
 9 **Promulgation Of Regulations Exclusively Governing Operating**  
 10 **Subsidiaries**

11 The OCC’s general rulemaking authority under 12 U.S.C. Section 93a is  
 12 insufficient to support its promulgation of regulations that seek to give the OCC exclusive regulatory  
 13 authority over operating subsidiaries, especially where as here, the entity is a state-chartered  
 14 corporation. Title 12 U.S.C. Section 1 establishes the OCC as the federal agency responsible for  
 15 overseeing national banks established pursuant to the NBA.<sup>5</sup> The general rulemaking authority of  
 16 the OCC is further defined by 12 U.S.C. § 93a, which provides in part:

17 Except to the extent that authority to issue such rules and  
 18 regulations has been expressly and exclusively granted to another  
 19 regulatory agency, *the Comptroller of the Currency is authorized*  
 20 *to prescribe rules and regulations to carry out the responsibilities*  
 21 *of the office, . . .”*

22 12 U.S.C. § 93a (emphasis added).

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23 <sup>5</sup> 12 U.S.C. § 1 provides:

24 There shall be in the Department of the Treasury a bureau charged with the execution of all laws  
 25 passed by Congress relating to the issue and regulation of national currency secured by United  
 26 States bonds . . . , of all Federal Reserve notes, except for the cancellation and destruction, and  
 27 accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for  
 28 circulation, the chief officer of which bureau shall be called the Comptroller of the Currency and  
 shall perform his duties under the general directions of the Secretary of the Treasury. The  
 Comptroller of the Currency shall have the same authority over matters within the jurisdiction of  
 the Comptroller as the Director of the Office of Thrift Supervision has over matters within the  
 Director's jurisdiction under section 3(b)(3) of the Home Owners' Loan Act [12 U.S.C. §  
 1462a(b)(3)(b)(3)] . . .

1 It is undisputed that the OCC's responsibilities include the oversight and  
2 regulation of national banks. While 12 U.S.C. § 93a recognizes and codifies the OCC's authority to  
3 regulate in the area of national banking, it does not recognize or codify the OCC's authority to  
4 regulate operating subsidiaries of national banks. To regulate operating subsidiaries the OCC must  
5 have express Congressional authorization. *See Chevron U.S.A. Inc. v. Natural Resources Defense*  
6 *Council, Inc.*, 467 U.S. 837 (1984)

7 In *Motion Picture Association of America, Inc. v. Federal Communications*  
8 *Commission*, 309 F.3d 796, 801 (D.C. Cir. 2002), the Court of Appeals specifically addressed the  
9 issue of an agency's general grant of authority and found such authority insufficient to support the  
10 FCC's promulgation of regulations regarding video description rules that impacted television  
11 program content.<sup>6</sup> *Id.* at 805. In *Motion Picture Association of America*, the court rejected the  
12 FCC's attempt to rely on a general grant of authority, even though that authority was more broad  
13 than that on which the OCC basis its preemption claim in this case.

14 The FCC was expressly authorized to "perform any and all acts, make such  
15 rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in  
16 the execution of its functions." *Id.* at 802-803 (quoting § 1 of the Communications Act, *codified at*  
17 *47 U.S.C. § 154(i)*). The general grant of authority further directed the agency to "ensure that all  
18 people of the United States, without discrimination, have access to wire and radio communication  
19 transmissions." *Id.* at 804 (summarizing § 1 of the Communications Act); *cf.* 12 U.S.C. § 93a  
20 (granting the OCC the authority to prescribe rules and regulations to carry out the responsibilities of  
21 the office).

22 In adopting regulations requiring video description to provide better access to  
23 the blind, the FCC exceeded its authority as the regulations had the effect of governing  
24 programming content, which in turn had constitutional implications. *Motion Picture Association of*  
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26 <sup>6</sup> The Motion Picture Association of America, Inc., also put before the court arguments intending to show that another  
27 section of the statute (47 U.S.C. § 613) by its express terms denied the FCC the authority to promulgate the regulations  
28 at issue. However, the court principally rested its decision that the promulgation of the regulation was improper on the  
agency's claim of general rulemaking authority. *Motion Picture Association of America, Inc. v. Federal*  
*Communications Commission*, 309 F.3d 796, 801, (D.C. Cir. 2002).



1 *America*, 309 F.3d 796, 804-805. The court found that important issues such as the implication of  
2 constitutional rights required a more express grant of authority than the FCC possessed in its  
3 general rulemaking authority and than was implied by the statutory scheme. *Id.* at 805.

4 Like the constitutional implications raised in *Motion Picture Association of*  
5 *America*, the plaintiffs are asking this Court to condone the OCC's promulgation of regulations that  
6 have Tenth Amendment implications. Consistent with the District of Columbia appellate court, this  
7 Court should reject the OCC's promulgation of such regulations in the absence of express  
8 congressional authorization. The NBA does not expressly address operating subsidiaries. *See* 12  
9 U.S.C. §§ 1, et seq. Further, nothing in the NBA indicates an intent by Congress for the OCC to  
10 issue regulations giving it exclusive regulatory authority over operating subsidiaries.

11 While finding that the FCC's authority under the statute was broad, the court  
12 held it was "not without limits." *Motion Picture Association of America*, at 804. Here, while the  
13 OCC's general rulemaking authority is broad as it applies to national banks, it must be restrained  
14 where it seeks to expand its limited delegated Congressional authority.<sup>7</sup> Congress has never  
15 expressly extended the rulemaking authority of the OCC to operating subsidiaries. *Cf.* 12 U.S.C.  
16 §24a(a)(5) (directing the OCC to promulgate regulations regarding financial subsidiaries).

17 To find that the OCC's general rulemaking authority vests in the agency the  
18 power to regulate operating subsidiaries of national banks, to the exclusion of the states, would be  
19 to grant the OCC unlimited authority not contemplated and not yet authorized by Congress.  
20 Administrative agencies, such as the OCC, are not granted unlimited power. Rather, they are given  
21 limited and delegated authority only "to adopt regulations to carry into effect the will of Congress  
22 as expressed by . . . statute." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). Congress has  
23 not seen fit to express its will with regard to operating subsidiaries and has not enacted legislation  
24 recognizing or governing operating subsidiaries of national banks. Therefore, the OCC's  
25 promulgation of regulations governing operating subsidiaries is a manifestation of the OCC's will,  
26

27 \_\_\_\_\_  
28 <sup>7</sup> *See Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638, 645-646 (D.C. Dist. 2000) (finding that the Comptroller of the Currency exceeded his congressionally delegated authority when he promulgated regulations pursuant to 12 U.S.C. 24 (Seventh) allowing national banks to sell crop insurance).

1 not the will of Congress. Such regulations are not proper and exceed the OCC's limited delegated  
2 authority.

3 **2. The OCC's Interpretation Of 12 U.S.C. § 24 (Seventh) Does Not Support**  
4 **Its Promulgation Of Regulations Exclusively Governing Operating**  
5 **Subsidiaries**

6 Title 12 U.S.C. § 24 (Seventh) authorizes *national banks* to exercise “. . . all  
7 such incidental powers as shall be necessary to carry on the business of banking; . . .” Conceding  
8 for purposes of argument that § 24 (Seventh) gives *national banks* the ancillary authority to  
9 establish operating subsidiaries, this section in no way acts as express Congressional authority for  
10 the *OCC* to regulate such operating subsidiaries to the exclusion of the states. Section 24 (Seventh)  
11 makes no mention of operating subsidiaries. Rather it is a broad grant of authority directly to  
12 *national banks*, not the regulatory body.

13 Further, nothing within § 24 (Seventh) expressly grants to the OCC the  
14 authority to regulate all “such incidental powers” in which the national banks are permitted to  
15 exercise or engage. At best, 12 U.S.C. § 24 (Seventh) gives the OCC the authority to determine  
16 what powers are, in fact, incidental to the business of banking. *See NationsBank of North Carolina,*  
17 *N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1996).

18 While several cases have impliedly recognized a national bank's ability to  
19 conduct banking activities through operating subsidiaries, no case has directly dealt with the issue  
20 of the OCC's exclusive regulatory authority over operating subsidiaries. In *M & M Leasing Corp.*  
21 *v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9<sup>th</sup> Cir. 1977), the issue before the court was whether the  
22 “business of banking” authorized by 12 U.S.C. § 24 (Seventh) included the leasing of personal  
23 property. *Id.* at 1380. Contrary to the case at bar, the court was never asked to reach the issue that  
24 an operating subsidiary was the equivalent of a national bank or subject to the OCC's exclusive  
25 regulatory authority. *See also NationsBank of North Carolina, N.A. v. Variable Annuity Life*  
26 *Insurance Co.*, 513 U.S. 251 (1995) (whether national banks may serve as agents in the sale of  
27 annuities); *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) (whether the Comptroller  
28 of the Currency exceeded his authority when he approved the application of national banks for the

1 establishment of discount brokerage subsidiaries); *Marquette National Bank of Minneapolis v. First*  
2 *Omaha Service Corp.*, 439 U.S. 299 (1978) (whether the NBA authorized a national bank located in  
3 one state to charge an interest rate allowed by its home state, when that interest rate is greater than  
4 the rate permitted by the bank's nonresident customers); *American Insurance Association v. Clarke*,  
5 865 F.2d 278 (D.C. Cir 1988) (whether the formation of a national bank subsidiary to offer  
6 municipal bond insurance was permissible under the NBA).

7           Moreover, Congress has been clear when it intends to delegate authority to the  
8 OCC to address areas significantly implicating or preempting state laws. *See generally* 12 U.S.C. §  
9 36; 12 U.S.C. §§ 1861-1867; 12 U.S.C. § 24a. That Congress has not seen fit to delegate such  
10 authority to the OCC in the case of operating subsidiaries is tantamount to a declaration from  
11 Congress that it has withheld such power. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153  
12 (1978).

13           In 1994, Congress enacted the Riegle-Neal Interstate Banking Act, which  
14 established interstate branches of national banks and codified the conditions upon which a national  
15 bank may retain or establish and operate a branch or branches of a national bank. Pub. L. 103-328,  
16 108 Stat. 2338 (Sept. 29, 1994) *codified at* 12 U.S.C. § 36.<sup>8</sup> Pursuant to this statute, branches of  
17 national banks are generally subject to the laws of the host State where the branch is located  
18 regarding consumer protection, fair lending, community reinvestment and establishment of interstate  
19 branches. 12 U.S.C. § 36(f)(1)(A). This is true, except when federal law expressly preempts the  
20 application of the state law to a national bank or if the OCC has made a determination that the  
21 application of the state law would have a discriminatory impact on the branch. *Id.* The statute  
22 further provides that the OCC is responsible for enforcing all applicable state laws to which the  
23 branch of a national bank is subject. 12 U.S.C. § 36(f)(1)(B).

24           There has been no similar declaration from Congress addressing the  
25

26 <sup>8</sup> 12 U.S.C. §36(l) defines "branch" as follows:

27       The term "branch" as used in this section shall be held to include any branch bank, branch office,  
28       branch agency, additional office, or any branch place of business located in any State or Territory  
      of the United States or in the District of Columbia at which deposits are received, or checks paid,  
      or money lent. The term "branch" as used in this section, does not include an automated teller  
      machine or a remote service unit.

1 application of state law, or authorizing preemption of state law applicable to operating subsidiaries  
2 of national banks, or authorizing the OCC's exclusive authority over them.

3 In the Bank Service Company Act, 12 U.S.C. §§ 1861-1867, Congress has  
4 expressly given the OCC the same examination and enforcement authority over a bank service  
5 company<sup>9</sup> owned by a national bank that the OCC exercises over the parent national bank. *See* 12  
6 U.S.C. § 1818.<sup>10</sup> The Bank Service Company Act specifically provides that the performance of  
7 those acts permissible by the bank service company shall be governed and "subject to regulation and  
8 examination by such agency to the same extent as if such services were being performed by the bank  
9 itself." 12 U.S.C. § 1867(c)(1). In the case of a bank service company owned or operated by a  
10 national bank, the OCC is the appropriate federal agency responsible for such supervision and  
11 enforcement. 12 U.S.C. § 1818; 12 U.S.C. §§ 1861-1867.

12 However, Congress has never enacted similar legislation granting the OCC  
13 authority to preempt state laws applicable to such state-chartered entities such as NCMC.

14 Congress also spoke to the issue of the application of state law to national  
15 banks and the preemption of state law when it enacted the Gramm-Leach-Bliley Act (GLBA). *See*  
16 *generally* 12 U.S.C. §§ 24a et seq; *see also* 15 U.S.C. § 6701. The GLBA grants national banks the  
17 authority to engage in certain activities, such as insurance activities and securities transactions,  
18 through "financial subsidiaries," subject to certain conditions. 12 U.S.C. § 24a(a)(1) and (a)(2).

19 Title 15 U.S.C. section 6701 of the GLBA expressly limits the preemption of  
20 state laws as they apply to financial subsidiaries of national banks. Preemption of a state law is  
21 specifically prohibited if: (A) the state law does not relate to or regulate insurance sales,  
22 solicitations, or cross marketing activities; (B) the state law does not relate to or regulate the  
23

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24  
25 <sup>9</sup> A "bank service company" is defined as:

26 . . . (2) any corporation-- (i) which is organized to perform services authorized by this Act [12  
27 USCS §§ 1861 et seq.] (ii) all of the capital stock of which is owned by 1 or more insured banks;  
28 and (B) any limited liability company-- (i) which is organized to perform services authorized by  
this Act [12 USCS §§ 1861 et seq]; and (ii) all of the members of which are 1 or more insured  
banks.

<sup>10</sup> 12 U.S.C. § 1818 sets forth the OCC's general enforcement authority over national banks.

1 business of insurance activities; (C) the state law does not relate to certain securities investigations  
2 or enforcement actions; and (D) the state law does not treat depository institutions and their affiliates  
3 differently than other persons engaged in the same activities, does not prevent a depository  
4 institution or affiliate from engaging in activities authorized by the GLBA and does not conflict with  
5 the intent of the GLBA. 15 U.S.C. § 6701(d)(4)(i) to (iv).

6 There has been no similar declaration from Congress regarding the  
7 application of state law, or preemption of same, as it applies to operating subsidiaries of national  
8 banks, or the OCC's exclusive authority over them. In short, where Congress has intended to  
9 preempt state laws and vest all authority in the OCC, it has done so explicitly, not implicitly.

10 The assertions by plaintiffs and the OCC in the preliminary injunction  
11 briefing that the OCC has plenary authority to adopt regulations governing operating subsidiaries of  
12 national banks to the exclusion of the states is, therefore, flawed and to find otherwise would be to  
13 usurp the power of Congress. As the court stated in *Independent Insurance Agents of America, Inc.*  
14 *v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000), such expansive authority would allow national banks and  
15 their federal regulatory agency "to constantly expand their field of operations on an incremental  
16 basis without congressional action." *Id.* at 645. In this case, an impermissible expansion of the  
17 OCC's authority to the exclusive regulation of operating subsidiaries would result in just such an  
18 unprecedented and unauthorized expansion of the OCC's power.

19 **3. The GLBA Does Not Delegate To The OCC Authority To Promulgate**  
20 **Regulations Exclusively Governing Operating Subsidiaries**

21 In promulgating 12 C.F.R. § 7.4006, the OCC cited only the GLBA as its  
22 statutory authority to expand its exclusive regulatory authority to operating subsidiaries. *See* 66  
23 Fed.Reg. 34784, 34788, n.15. However, Congress did not recognize operating subsidiaries in the  
24 GLBA or expressly authorize the OCC to promulgate regulations governing such entities to the  
25 exclusion of the states. *See generally* 12 U.S.C. § 24a.

26 The GLBA grants national banks the authority to engage in certain activities  
27 through "*financial subsidiaries*," subject to certain conditions. 12 U.S.C. § 24a(a)(1) and (a)(2)  
28 (emphasis added). Title 12 U.S.C. section 24a, subsection (g)(3)(A), to which the OCC cites as its

1 authorizing power, is a definition of a “financial subsidiary,” not an “operating subsidiary”. The  
2 term “financial subsidiary” means “any company that is controlled by 1 or more insured depository  
3 institutions *other than a subsidiary that*—(A) engages solely in activities that national banks are  
4 permitted to engage in directly and are conducted subject to the same terms and conditions that  
5 govern the conduct of such activities by national banks. . . .” 12 U.S.C. § 24a(g)(3)(A) (emphasis  
6 added).

7 Under the maxim *expressio unius est exclusio alterius*, where a statute  
8 provides authority for one action, and is silent as to a similar, related action, the law must be  
9 interpreted as authorizing only the former and not the latter. *See Tennessee Valley Auth. v. Hill*, 437  
10 U.S. 153, 188 (1978); *Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 152-153  
11 (D.C. Cir. 2001), *petition for cert granted*, 122 S.Ct. 1202 (U.S. Mar. 4, 2002) (No. 01-657). That  
12 is, “[a] statute listing the things it does cover exempts, by omission, the things it does not list. As to  
13 the items omitted, it is a mistake to say that Congress has been silent. Congress has spoken – these  
14 matters are outside the scope of the statute.” *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d  
15 885, 887 (D.C. Cir. 1999). Congress did not expressly recognize operating subsidiaries or grant to  
16 the OCC the authority to promulgate regulations governing operating subsidiaries in the GLBA.  
17 Accordingly, operating subsidiaries and their regulation are outside the scope of the GLBA.

18 Further, subsection (a)(5) of 12 U.S.C. § 24a explicitly directs the Comptroller  
19 of the Currency to enact regulations prescribing the procedures to implement the purposes and  
20 provisions of the Act, namely national banks’ ability to conduct certain operations through “financial  
21 subsidiaries.” Despite making the most recent pronouncement on banking law in the GLBA in 1999,  
22 Congress gave no similar direction or grant of authority to the Comptroller to promulgate regulations  
23 regarding “operating subsidiaries.”

24 Thus, the GLBA is not the express, and cannot be the implied, Congressional  
25 authority required to support the OCC’s promulgation of 12 C.F.R. § 7.4006, whereby the OCC  
26 purports to restrict the application of state laws to operating subsidiaries of national banks. *See*  
27 *United States v. Mead Corporation*, 533 U.S. 218 (2001); *Chevron U.S.A. Inc. v. Natural Resources*  
28

1 *Defense Council, Inc.*, 467 U.S. 837 (1984). Neither plaintiffs nor the OCC provide this Court with  
2 any other Congressional authority for the OCC's action.

3 **4. Absent A Delegation Of Authority From Congress, The OCC's**  
4 **Regulations Are Not Entitled To Deference**

5 Absent direct Congressional authority to regulate operating subsidiaries of  
6 national banks, the OCC's regulations regarding operating subsidiaries are not entitled to deference.  
7 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

8 The Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense*  
9 *Council, Inc.*, 467 U.S. 837 (1984) set forth the analysis in two steps. In the first step, the Court  
10 must determine if "Congress has directly spoken to the precise question at issue." *Id.* at 842-843. If  
11 Congress has spoken to the issue, that is the end of the Court's inquiry because the Court, as well as  
12 the agency, "must give effect to the unambiguously expressed intent of Congress." *Id.* If Congress  
13 has not spoken to the exact question and the agency is acting pursuant to an express or implied grant  
14 of authority, the Court must employ the second step of the *Chevron* analysis. Under this second  
15 step, the Court must determine if the agency's interpretation of the statute is "reasonable" and not  
16 otherwise "arbitrary, capricious, or manifestly contrary to the statute." *Id.*

17 Deference to an agency's action is warranted "only when Congress has left a  
18 gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see*  
19 *also United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001). Where the agency lacks  
20 such delegated authority, such as here, there is no need for the Court to engage in the second step of  
21 the *Chevron* analysis and inquire whether the regulations are reasonable, as "an agency may not  
22 promulgate even reasonable regulations that claim the force of law without delegated authority from  
23 Congress." *Motion Picture Association of America, Inc. v. Federal Communications Commission*,  
24 309 F.3d 796, 801 (2002); *see also Christensen v. Harris County*, 529 U.S. 576, 596-597 (2000)  
25 (BREYER, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular  
26 interpretive authority to an agency, *Chevron* is "inapplicable").  
27  
28

1 In this case, the OCC lacks the necessary delegated authority from Congress  
2 to enact regulations governing operating subsidiaries to the exclusion of the states. Accordingly, the  
3 Court need not engage in the second step of the *Chevron* analysis. However, even if the Court were  
4 to do so, the OCC's regulations are not reasonable.

5 **5. The OCC's Assertion Of Exclusive Authority Over Operating**  
6 **Subsidiaries Is Unreasonable**

7 The OCC's promulgation of regulations giving it exclusive regulatory  
8 authority over operating subsidiaries cannot be a reasonable interpretation of the statute when there  
9 is no express congressional delegation of authority to the OCC to regulate operating subsidiaries.  
10 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see*  
11 *also United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001); *Motion Picture Association*  
12 *of America, Inc. v. Federal Communications Commission*, 309 F.3d 796, 801 (2002). Not only is the  
13 OCC's statutory authority lacking, but the OCC's interpretation of this alleged statutory authority is  
14 unreasonable and conflicts with the purposes of the National Bank Act.

15 The purpose of the National Bank Act of 1864 was to establish a "national  
16 banking system." *Marquette National Bank v. First Omaha Service Corp.*, 439 U.S. 299, 314-315  
17 (1978). National banks were established to perform various functions, including providing a  
18 currency for the whole country, financing commerce and acting as private depositories. *Franklin*  
19 *National Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954).

20 Since the creation of national banks, courts have recognized the applicability  
21 of state laws to national banks. *See National Bank v. Commonwealth*, 76 U.S. (9 Wall) 353 (1870)  
22 (first case recognizing applicability of state laws to national banks). In *National Bank*, the Supreme  
23 Court upheld a Kentucky statute regarding the collection of state taxes directly from national banks,  
24 finding that since the NBA was silent on the issue, the bank was subject to the state law. *Id.* at 361-  
25 362.

26 The Supreme Court in *McClellan v. Chipman*, 164 U.S. 347 (1896) held a  
27 state statute to be applicable to a national bank even when federal law expressly addressed the  
28 subject matter of the state law. *McClellan*, 164 U.S. 347, 358. The federal law permitted national



1 banks to take real estate for given purposes, including security for debt or in satisfaction of debts,  
2 while Massachusetts law forbade certain real estate transfers by insolvent transferees. *Id.* at 357-  
3 358.

4 The Supreme Court upheld the Massachusetts statute in the face of a challenge  
5 from the national bank that the law improperly interfered with the functions granted to it by federal  
6 law. The Court found no express conflict between the federal law and the Massachusetts law,  
7 despite the limitations imposed by the Massachusetts law. *McClellan*, 164 U.S. 347, 358. The Court  
8 further noted that no function of national banks is destroyed or hampered by allowing the banks to  
9 exercise power to take real estate, subject to the same conditions and restrictions to which all *other*  
10 *citizens* of the state were subjected. *Id.* (emphasis added).

11 The Court rejected the proposition that any limitation by a state on the making  
12 of contracts is a restraint upon the power of a national bank, and indicated that the proper issue was  
13 whether the state law violated the act of Congress, noting:

14 “As long since settled in the cases already referred to, the purpose  
15 and object of Congress in enacting the national bank law was to  
16 leave such banks as to their contracts in general under the  
17 operation of the state law, and thereby invest them as Federal  
18 agencies with local strength, whilst, at the same time, preserving  
19 them from undue state interference wherever Congress within the  
20 limits of its constitutional authority has expressly so directed, or  
21 wherever such state interference frustrates the lawful purpose of  
22 Congress or impairs the efficiency of the banks to discharge the  
23 duties imposed upon them by the law of the United States.”

21 *McClellan*, 164 U.S. 347, at 359.

22 Similarly, recent cases affirm the principle that a national bank is subject to  
23 state law unless that law “interferes with the purposes of its creation, or destroys its efficiency, or is  
24 in conflict with some paramount federal law.” *American Bankers Association v. Lockyer*, 2002 U.S.  
25 Dist. LEXIS 24521 (E.D. Cal. Dec. 2002) (quoting *Lewis v. Fidelity & Deposit Co. of Maryland*,  
26 292 U.S. 559, 566 (1934)).

27 Further, as stated in *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980)  
28 “[w]hatever may be the history of federal-state relations in other fields, regulation of banking has

1 been one of dual control since the passage of the National Bank Act in 1863. . . .[U]nquestionably,  
 2 as in other businesses, federal presence in the banking fields has grown in recent times. But  
 3 congressional support remains for dual regulation. In only a few instances has Congress expressly  
 4 preempted state regulation of national banks." *Id.* at 985.

5 The California statutes at issue in this case in no way interfere with the  
 6 purposes of the NBA or the operation of national banks. Accordingly, the OCC's interpretation of  
 7 the National Bank Act as giving it exclusive regulatory authority over operating subsidiaries, which  
 8 are not national banks, is not reasonable.

### 9 C. The CRMLA Is Not Preempted By Federal Law

10 The CRMLA does not conflict with federal law, notwithstanding the issue that the  
 11 OCC exceeded its authority in promulgating 12 C.F.R. section 7.4006. Plaintiffs' brief is filled only  
 12 with cases supporting the preemption of state laws with respect to national banks. Nonetheless, this  
 13 case involves a consumer protection law, which does not, by its own terms, apply to national banks.  
 14 California Financial Code section 50003(g)(l). Further, the Commissioner's application of the  
 15 CRMLA has been only to NCMC, a non-national, state-chartered entity, which has voluntarily  
 16 maintained its license from the Commissioner under that law as a means of doing residential  
 17 mortgage lending business in the State of California. Accordingly, the cases cited by plaintiffs are  
 18 not on point with this matter.

19 "Federal law may preempt state law in three different ways. First, Congress may  
 20 preempt state law by so stating in express terms. (cite omitted). Second, preemption may be inferred  
 21 when federal regulation in a particular field is 'so pervasive as to make reasonable the inference that  
 22 Congress left no room for the States to supplement it.' (cite omitted) . . . Third, preemption may be  
 23 implied when state law actually conflicts with federal law." (cite omitted). *Bank of America v. City*  
 24 *& County of San Francisco*, 309 F.3d 551, 558 (9<sup>th</sup> Cir. 2002); *Accord American Bankers*  
 25 *Association v. Lockyer*, 2002 U.S. Dist. LEXIS 2452 (E.D. Cal. Dec. 2002) (slip op. at 21).

26 There is an assumption of non-preemption afforded to state laws. *See New York State*  
 27 *Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) "[W]e have  
 28 never assumed lightly that Congress has derogated state regulation, but instead have addressed

1 claims of preemption with the starting presumption that Congress does not intend to supplant state  
2 law." *Id.* at 654. Plaintiffs rely upon the factually dissimilar *United States v. Locke*, 529 U.S. 89  
3 (2000) case in support of their argument that there is no presumption against preemption. In *Locke*,  
4 the Supreme Court refused to apply "an 'assumption' of non-preemption" in determining the validity  
5 of Washington laws that imposed restrictions on oil tankers using the state's navigable waterways.  
6 *Id.* at 108. *Locke* involved Washington State's attempts to regulate "national and international  
7 maritime commerce, an area the Supreme Court noted that Congress had created an extensive  
8 'federal statutory structure', which has as one of its objectives a uniformity of regulation for  
9 maritime commerce" *Id.* at 108.

10 In a case similar to this matter, *Video Trax v. Nationsbank, N.A.*, 33 F.Supp.2d 1041  
11 (S.D. Fla. 1998), the court in discussing state laws limitations on service charges and whether they  
12 are preempted by the National Bank Act held that "[t]here is no comprehensive federal statutory  
13 scheme governing the taking of deposits. Only one section of the Bank Act even relates to this  
14 function, and merely authorizes banks to accept deposits. This section may, by implication, also  
15 authorize banks to charge for deposit-related services as an incidental power necessary to carry on  
16 the business of receiving deposits. But such implied authority does not constitute a regulatory  
17 scheme so comprehensive as to displace state law." *Id.* at 1049.

18 The situation discussed in *Video Trax* is the same as with lending. Only one section  
19 of the National Bank Act ("NBA") relates to lending, and it merely authorizes banks to loan on  
20 personal security. *See* 12 U.S.C. section 24 (Seventh). As declared by the court in *Video Trax*, this  
21 hardly constitutes a comprehensive regulatory scheme.<sup>11</sup>

22 Further, as stated in *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980)  
23 "[w]hatever may be the history of federal-state relations in other fields, regulation of banking has  
24 been one of dual control since the passage of the National Bank Act in 1863. . . .[U]nquestionably,  
25 as in other businesses, federal presence in the banking fields has grown in recent times. But  
26

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27 <sup>11</sup> *See also* *Purdue v. Crocker National Bank*, 38 Cal.3d 913, 937 (1985) finding application of state law to banking  
28 charges not preempted by a comprehensive federal statutory scheme that occupied the field, and *Booth v. Old National Bank*, 900 F.Supp. 836, 841 (1995) finding that "Congress has not completely preempted the entire banking field."

1 congressional support remains for dual regulation. In only a few instances has Congress expressly  
2 preempted state regulation of national banks." *Id.* at 985.

3 Congress, in adopting the Riegle-Neal Interstate Banking and Efficiency Act of 1994  
4 ("Riegle-Neal Act"), noted the judicial presumption against preemption. The report of the House-  
5 Senate conference committee on the Riegle-Neal Act declared: "[s]tates have a strong interest in the  
6 activities of and operations of depository institutions doing business within their jurisdictions,  
7 regardless of the type of charter an institution holds. In particular, States have a legitimate interest in  
8 protecting the rights of their consumers, businesses, and communities." The House-Senate  
9 conference committee went on to state in regards to determining whether state laws are preempted  
10 by federal law that "[c]ourts generally use a rule of construction that avoids finding a conflict  
11 between Federal and State law where possible." H.R. Rep. No. 103-651 (Conf. Rep.), at 53,  
12 reprinted in 1994 U.S. Code Cong. & Ad. News 2068, 2074.<sup>12</sup>

13 Congressional support for dual control, particularly in the area of lending, continues  
14 as it was recently the topic of conversation between Comptroller Hawke and former chairman of the  
15 State Senate Banking Committee as reported by the American Banker on February 10, 2003.<sup>13</sup>

16 Accordingly, the court must begin reviewing this case with a presumption against  
17 preemption.

### 18 **1. Express Preemption Is Not Present**

19 The cases cited above regarding the assumption of non-preemption, and  
20 Congress' comments regarding the passage of the Riegle-Neal Act further support the conclusion  
21 that there is no express preemption of the CRMLA by the NBA. In *Video Trax, supra*, the United  
22 States District Court of the Southern District of Florida specifically held that "[t]he Bank Act does  
23  
24

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25 <sup>12</sup> The Commissioner respectfully requests the Court take judicial notice of the Appendix, at Exhibit 1, attached to the  
26 Commissioner's Opposition to Plaintiffs' Motion for Preliminary Injunction in the related case of *Wells Fargo Bank,*  
*N.A. v. Boutris* (Civil Action No. S-03-0157).

27 <sup>13</sup> The Commissioner respectfully requests the Court take judicial notice of the Appendix, at Exhibit 2, attached to the  
28 Commissioner's Opposition to Plaintiffs' Motion for Preliminary Injunction in the related case of *Wells Fargo Bank,*  
*N.A. v. Boutris* (Civil Action No. S-03-0157).

1 not contain an express statement that Congress intended to preempt state law in its entirety . . . ." 33  
2 F.Supp.2d at 1048.

3 Furthermore, as discussed above, the issue of preemption in this matter does  
4 not deal with a national bank, but with an alleged operating subsidiary of a national bank. A reading  
5 of the NBA discloses no mention of national bank operating subsidiaries. The CRMLA by its own  
6 terms does not apply to national banks. California Financial Code section 50003(g)(1). Thus, there  
7 can be no preemption of the CRMLA by express provision.

## 8 **2. Field Preemption Does Not Apply**

9 The *Long*, *Video Trax*, *Purdue* and *Booth* cases cited above, and Congress'  
10 comments regarding the passage of the Riegle-Neal Act also support the conclusion there is no field  
11 preemption of the CRMLA by the NBA either. As succinctly stated in the *Video Trax* case  
12 "[b]anking is not an area in which Congress has evidenced an intent to occupy the entire field to the  
13 exclusion of the states." *Video Trax*, 33 F. Supp. 2d at 1048.

## 14 **3. The CRMLA Does Not Conflict With The NBA And The** 15 **OCC Regulations To Such A Degree That Preemption Is Warranted**

16 Plaintiffs' claim that as an operating subsidiary of National City Bank, the  
17 CRMLA is preempted as to NCMC because they conflict with the powers granted to National City  
18 Bank as a national bank, even though NCMC has voluntarily maintained its license under the  
19 CRMLA.

20 A review of the NBA discloses that it expressly grants national banks the  
21 power to lend. 12 U.S.C. section 24(Seventh). However, the NBA does not by its express terms,  
22 grant national banks the power to own operating subsidiaries or to carry on their lending activities  
23 through such operating subsidiaries. This has been a total creation of the OCC, and Plaintiffs' claim  
24 is predicated solely upon 12 C.F.R. section 7.4006, promulgated by the OCC, effective August 1,  
25 2001.

26 There are numerous cases that have set forth the parameters for establishing  
27 conflict preemption under the NBA, though none have dealt with an operating subsidiary of a  
28 national bank. Most recently, in *Bank of America* the Ninth Circuit found that actual "conflict arises

1 when ‘compliance with both federal and state regulations is a physical impossibility,’ (cite omitted)  
 2 or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes  
 3 and objectives of Congress.’” *Bank of America*, 309 F.3d at 558; accord, *American Bankers*  
 4 *Association*, 2002 U.S. Dist. LEXIS 24521 (E.D. Cal. Dec. 2002) (Slip Op. at 21). The court in  
 5 *American Bankers Association* found that conflict preemption can also occur when state law  
 6 ‘frustrates the purpose of the [ ] national legislation, or impairs the efficiencies of [ ] agencies of the  
 7 federal government to discharge their duties.’” *American Bankers Association*, 2002 U.S. Dist.  
 8 LEXIS 24521 (E.D. Cal. Dec. 2002) (Slip Op. at 21) citing *McClellan v. Chipman*, 164 U.S. 347,  
 9 357 (1896)). The court noted that “state regulation of banking is permissible (not preempted) when  
 10 ‘it does not prevent or significantly interfere with the national bank’s exercise of its powers.’” (citing  
 11 *Bank of America*, 309 F.3d 558-559 quoting *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25,  
 12 31 (1996)).

13 In *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1870), the  
 14 Supreme Court, rejected a national bank’s preemption claim with respect to state tax laws, noting the  
 15 states’ ability to regulate national banks.<sup>14</sup> *Id.* at 361-362. The court held that “[i]t is only when  
 16 State law *incapacitates* the banks from discharging their duties to the [federal] government that it  
 17 becomes unconstitutional.” *Id.* at 361-362 (emphasis added).

18 A later Supreme Court case, *McClellan v. Chipman*, 164 U.S. 347 (1896), in  
 19 upholding a Massachusetts statute which invalidated preferences made by insolvent debtors and  
 20 assignments and transfers made in contemplation of insolvency, including preferential transfers of  
 21 real property made by an insolvent debtor to a national bank, focused on whether the state law  
 22 “impairs the efficiency of national banks or frustrates the purpose for which they were created.” *Id.*  
 23 at 358. In determining whether state law impaired the efficiency or frustrated the purpose for which  
 24 national banks were created, the Supreme Court looked to whether a function of the national bank  
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 26

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27 <sup>14</sup> In making it’s ruling, the Court in *National Bank v. Commonwealth* stated “[i]t certainly cannot be maintained that  
 28 banks or other corporations or instrumentalities of the [federal] government are to be wholly withdrawn from the  
 operation of state legislation. . . . [National banks] are subject to the laws of the State, and are governed in their daily  
 course of business far more by the laws of the State than of the nation. 76 U.S. (9 Wall.) 353, 361-362.

1 had been *destroyed* if it were required to comply with the state law to the same extent all other  
2 citizens of the state were subjected. *Id.*

3 NCMC, according to its papers, has been an operating subsidiary of National  
4 City Bank, under the licensing, regulatory, supervisory, examination, and enforcement jurisdiction of  
5 the OCC for several years. During this same time, NCMC has also voluntarily submitted itself to the  
6 licensing, regulation, supervision, examination, and enforcement jurisdiction of the Commissioner  
7 under the CRMLA. That this alleged dual regulation has been ongoing for several years, evidences  
8 that there is no “physical impossibility” to NCMC’s “simultaneous compliance with both state and  
9 federal law”. Further, the fact that NCMC can only charge one day of interest prior to the  
10 recordation of the deed under the CRMLA, does not cause a “physical impossibility” for  
11 “simultaneous compliance” as there are no per diem interest requirements under the NBA. Thus, it  
12 is only the desire of NCMC to retain these interest overcharges that now has brought the plaintiffs  
13 forward to challenge the CRMLA.

14 NCMC’s ability to comply with both the federal law and the CRMLA for  
15 several years evidences that the CRMLA also does not “stand as an obstacle to the accomplishment  
16 and execution of the full purposes and objectives of Congress” or “frustrate the purpose of the NBA  
17 or impair the efficiencies of the OCC.” Or as stated another way by the court in *American Bankers*  
18 *Association*, “does not prevent or significantly interfere with the national bank’s exercise of its  
19 powers.” 2002 U.S. Dist. LEXIS 24521 (Slip Op. at 21).

20 The CRMLA *does not prevent or significantly interfere* with the lending  
21 activities of National City Bank, even if National City Bank desires to conduct certain of those  
22 lending activities through NCMC. Again, this is evidenced by plaintiffs’ ability to be a leader in the  
23 lending field in California for the last several years through NCMC (150,000 to 180,000 loans from  
24 2000 to present as claimed by plaintiffs), while voluntarily submitting to dual jurisdiction.

25 The tests established by the Supreme Court in *McClellan* and *National Bank*,  
26 for determining whether a state law impairs the efficiency or frustrates the purpose for which  
27 national banks were created is whether the state law “destroys a function” of the national bank or  
28 “incapacitates” the bank from discharging its duties.

1           The CRMLA does not “destroy” or “incapacitate” National City Bank from  
 2           lending. The CRMLA by its own terms does not apply to National City Bank. Accordingly,  
 3           National City Bank is free to lend through its California branches without any oversight whatsoever  
 4           from the Commissioner. That National City Bank has chosen to conduct certain of its lending  
 5           activity through NCMC (the legality of which remains questionable as discussed above), is of no  
 6           consequence because the lending activities of NCMC, as attested by plaintiffs, reveals no destruction  
 7           or incapacitation with respect to its ability to lend.

8           “As with express preemption, conflict preemption will not be found unless it  
 9           is the clear intent of Congress. . . . Courts must not lightly infer preemption, and it is the burden of  
 10          the party claiming Congress intended to preempt state law to prove it.” *Video Trax*, 33 F.Supp. 2d at  
 11          1048.

#### 12           **D.       The DIDMCA Does Not Preempt California Law**

13           Plaintiffs cannot demonstrate that preemption exists such that the California per diem  
 14           interest statutes, which regulate when a lender may begin charging interest, should be invalidated in  
 15           whole or part. The DIDMCA does not compel preemption of the per diem interest provisions,  
 16           insofar as the state statutes do not expressly limit the rate or amount of interest plaintiff may charge  
 17           and they do not frustrate or impair the goals and intent of the federal act.

##### 18           **1.       The California Per Diem Statutes Are Not Preempted By DIDMCA.**

19           Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, and as set forth  
 20           above, federal law may preempt state law “either by express provision, by implication, or by a  
 21           conflict between federal and state law. (Citations omitted).” *Shin v. Encore Mortgage Servs.*, 96 F.  
 22           Supp. 2d 419, 423 (D. N.J. 2000) *citing New York State Conf. of Blue Cross & Blue Shield Plans v.*  
 23           *Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). In addition, in areas traditionally regulated by the  
 24           states, such as consumer protection, there is a presumption against finding preemption of state law.  
 25           *California v. Arc America Corp.*, 490 U.S. 93, 101 (1989). “When Congress legislates in a field  
 26           traditionally occupied by the States, ‘we start with the assumption that the historic police powers of  
 27           the States were not to be superseded by the Federal Act unless that was the clear and manifest  
 28           purpose of Congress.’ (Citations omitted).” *Id.* at 101. In *Smiley v. Citibank (S.D.)*, N.A., 11 Cal.



1 4th 138 (1995), the California Supreme Court found that “historic police powers of the States”  
 2 extend to banking. *Id.* at 148.

3 If a statute contains an express preemption clause, the task of statutory  
 4 construction must in the first instance focus on the plain wording of the clause, which necessarily  
 5 contains the best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507  
 6 U.S. 658 (1993).

7 If the statutory language is ambiguous, *Burlington N. R.R. Co. v. Oklahoma*  
 8 *Tax Comm'n*, 481 U.S. 454, 461 (1987), or would work an unreasonable result, the courts may  
 9 consult relevant legislative history, *Cabral v. INS*, 15 F.3d 193, 194 (1<sup>st</sup> Cir. 1994), to confirm an  
 10 interpretation indicated by the plain language. *Strickland v. Commissioner, Maine Dep't of Human*  
 11 *Servs.*, 48 F.3d 12, 17 (1<sup>st</sup> Cir. 1996), *cert. denied*, 116 S. Ct. 145 (1995).

12 There is no clear and manifest intent of Congress to preempt California  
 13 statutes concerning when the lender may begin to charge interest. Furthermore, to the extent  
 14 potential conflict preemption is alleged, compliance with both state and federal law is possible, thus  
 15 obviating the need for federal preemption of the state statute. *See Arc America Corp.*, 490 U.S. at  
 16 94.

17 The first issue regarding DIDMCA before this court is whether the California  
 18 Corporations Commissioner may enforce the per diem limitation provision of subdivision (o) of  
 19 California Financial Code section 50204. This section provides that a lender may not "require a  
 20 borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of  
 21 the mortgage or deed of trust. . . ." Cal. Fin. Code § 50204(o).

22 Also at issue is whether the Commissioner may enforce an earlier version of  
 23 California Civil Code § 2948.5<sup>15</sup> (subsequently amended) that read in pertinent part as follows:

24 "interest on the principal obligation of a promissory note  
 25 secured by a mortgage or deed of trust on real property  
 26 improved with one-to-four residential dwelling units shall

27 <sup>15</sup> It should be noted that the Commissioner's authority to enforce the per diem statute is now codified in California  
 28 Financial Code section 50204(o), and the California Attorney General, who is not a party to this action, retains  
 jurisdiction to enforce the amended Civil Code section 2948.5.

1 not commence to accrue prior to close of escrow if the loan  
2 proceeds are paid into escrow or, if there was no escrow,  
3 the date upon which the loan proceeds have been made  
4 available for withdrawal as a matter of right, as specified in  
5 subdivision (d) of Section 12413.1 of the Insurance Code."

6 For purposes of this motion, the Commissioner's arguments apply equally to  
7 the former Civil Code section, which will not be discussed separately. Plaintiffs' contention that  
8 these statutes are preempted fails to take into account the express language of DIDMCA or the  
9 etiology of the Act.

10 Section 501 (a) of DIDMCA only preempts state laws "*expressly limiting* the  
11 rate or amount of interest, discount points, finance charges, or other charges . . . secured by a first  
12 lien on residential real property. . . ." 12 U.S.C. § 1735f-7a(a)(1) (emphasis added). Subdivision (o)  
13 of California Financial Code section 50204 does not fall within the type of activities preempted by  
14 DIDMCA because it does not *expressly limit* interest rates or amounts. Rather, the state statute  
15 establishes the date upon which the per diem interest may be assessed upon a borrower.

16 The DIDMCA statutory scheme was born at the end of the 1970s, in a period  
17 of extreme highs in home mortgage interest rates. As the court may find helpful, *Smith v. Fidelity*  
18 *Consumer Discount Co.*, 898 F.2d 907 (3d Cir. 1989) offers an analysis of historical context and  
19 legislative intent:

20 "DIDMCA was passed at a time when inflation and interest rates  
21 were soaring; in this context, *state usury laws* decreased the  
22 availability of home mortgage loans and hindered the ability of  
23 financial institutions to pay market rates of interest to depositors  
24 since usury laws limited them to lending at rates well below those  
25 that the market would have dictated. Thus, the Senate Report that  
26 accompanied the bill containing what became § 501 of DIDMCA  
27 found:

28 that where *state usury laws* require mortgage rates below market  
levels of interest, mortgage funds in those states will not be readily  
available and those funds will flow to other states where market  
yields are readily available. This artificial disruption of  
funds availability not only is harmful to potential homebuyers in  
states with such usury laws, it also frustrates national housing  
policies and programs. . . .

The committee believes *that this limited modification in state*

1                    *usury laws* will enhance the stability and viability of our Nation's  
 2                    financial system and is needed to facilitate a national housing  
 3                    policy and the functioning of a national secondary market in  
                      mortgage lending. . . ."

4                    *Smith* at 12 (emphasis added).

5                    While this goal of promoting the American dream of home ownership is  
 6                    certainly laudable, the California statutory provisions challenged by NCMC are unrelated to the very  
 7                    type of laws DIDMCA was enacted to preempt: state usury statutes. Yet, NCMC seeks to don the  
 8                    cloak of federal preemption to avoid a California provision that does not impair that statutory  
 9                    scheme in any way.

10                   Subdivision (o) is not a usury statute.<sup>16</sup> The per diem interest provisions do  
 11                   nothing more than compel a close relationship between the date interest charges begin and the date  
 12                   of recordation of the deed of trust. Subdivision (o) does absolutely nothing to frustrate the broad  
 13                   goals of DIDMCA. It does not limit the rate of interest NCMC can charge. It does not limit the total  
 14                   amount of interest NCMC can collect, as the rate of interest charged remains within the control of  
 15                   the NCMC and may be bargained with the consumer. The state law merely encourages lenders to be  
 16                   assiduous in providing borrowers with recorded title and trust deeds by preventing them from  
 17                   charging interest in excess of an allowable one day time period until the documents are recorded.

18                   **2.        Unlike State Usury Laws, The “Per Diem” Statute Does Not Impose Any**  
 19                   **Limitations Or Barriers Upon The Loan Market**

20                   Plaintiff’s reliance on *Shelton v. Mutual Savings and Loan*, 738 F.Supp. 1050  
 21                   (E.D. Mich. 1990) for the proposition that if a state law that prohibits charging of interest before loan  
 22                   funds are disbursed is preempted then California’s per diem statutes must also be preempted is  
 23                   misplaced. Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Preliminary  
 24                   Injunction, p. 16. Although *Shelton* did find preemption, it dealt in pertinent part with a Michigan  
 25                   statute that read as follows:

26                   "A mortgage loan or a land contract made under this Act shall not  
 27                   provide for *a rate of interest* added or deducted in advance, and

28                   <sup>16</sup> California’s usury law is found in the California Constitution, Article XV, sec. 1.

1 interest on the mortgage loan or land contract shall be computed  
2 from time to time only on the basis of unpaid balances."  
3 (Emphasis added.)

4 While the court struggled with the meaning of the state statutory language,  
5 and found at least three possible interpretations, including those urged by both parties to the suit, the  
6 *Shelton* court unlike this Court was faced with a statute that did expressly refer to "a rate of interest."  
7 The district court ultimately found it too ambiguous to interpret, and held that it is "not within the  
8 province of a federal court to attempt to read the minds of state legislators. . . ." *Shelton* at 1058.

9 Therefore, it is simply not accurate to say the *Shelton* case holds that a per  
10 diem statute like the one at issue here is preempted by DIDMCA. Indeed, that federal court said,  
11 ". . . if the state legislature had intended to prohibit lenders from charging interest on undisbursed  
12 funds, it could have done so clearly and unambiguously." *Id.* at 1058. Therefore, it remains an open  
13 question as to how the *Shelton* court would have ruled on a statute, such as California Financial  
14 Code section 50204(o), that does not expressly affect the rate of interest. While the *Shelton* court  
15 could not interpret the Michigan statute, it apparently concluded the Michigan law was a usury  
16 statute. *See Shelton* at 1057. However, the per diem statutes are unrelated to the California Usury  
17 Law. *Compare* Cal. Const. Art. XV, § 1 *with* Cal. Fin. Code § 50204(o).

18 The Commissioner invites the Court to review the express language and the  
19 underlying intent of DIDMCA expressed by Congress, to address the limitations imposed by the  
20 usury laws when they impede the loan market. The per diem interest statutes do not seek to impose  
21 such limitations. However, the statutes most certainly are "designed to protect borrowers," a goal  
22 which the DIDMCA drafting committee thought could peacefully coexist with the goals of the  
23 federal statute, and which the Office of Thrift Supervision ("OTS")<sup>17</sup> recognizes as permissible  
24 pursuant to its own regulations. *See* 12 C.F.R. 590.3 (c) ("Nothing in this section preempts  
25 limitations in state laws on prepayment charges, attorneys fees, late charges or other provisions  
26 *designed to protect borrowers.*" (emphasis added.)).

27 \_\_\_\_\_  
28 <sup>17</sup> The Federal Home Loan Bank Board and its successor, the OTS, are authorized to issue rules and regulations governing the implementation of DIDMCA pursuant to 12 U.S.C. § 1735f-7a(f).

1                   **3.       DIDMCA Does Not Preempt State Laws, Such As The Per Diem Statute,**  
2                   **That Are Designed To Protect Consumers**

3                   *Grunbeck v. Dime Savings Bank of New York, FSB*, 74 F.3d 331 (1<sup>st</sup> Cir.  
4 1996) considered whether DIDMCA preempted New Hampshire's simple interest statute (SIS). The  
5 court failed to find any congressional intent that would allow DIDMCA to preempt the SIS and  
6 determined that no express interest rate limitations existed in the SIS.

7                   The *Grunbeck* court emphasized the interpretive importance of the language  
8 from Section 501 of DIDMCA "expressly limiting the rate or amount of interest," the same issue  
9 under consideration in this case. The court contrasted this language with that contained in  
10 companion Section 521 where Congress, as relates to credit cards, preempted all state legislation  
11 "with respect to interest rates." *Grunbeck* at 338. The court recognized that Congress was acutely  
12 aware that its choice of the distinctive terminology -- "expressly limiting" - would be a primary  
13 interpretive tool. *Id.* In other words, this is evidence that if Congress had intended to preempt all  
14 state laws relating to interest rates, it could have done so as it did in Section 521. By preempting  
15 only those state statutes that "expressly limit" the amount or rate of interest, Congress contemplated  
16 state statutes, like the California per diem interest statutes or the New Hampshire simple interest  
17 statutes, would not be preempted.

18                   Plaintiffs contend that "there is no basis for the Commissioner's contention in  
19 the related cases of *Wells Fargo* and *Quicken Loans, Inc. v. Boutris*, No. 03-0256 GEB JFM, that  
20 '[a]n analogy may be drawn between [the] California [per diem restriction] and the simple interest  
21 statute (SIS) which is not preempted by DIDMCA according to the appellate court in *Grunbeck*.'" *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction*,  
22 at page 16. Plaintiffs' argument seeks to avoid the clear and simple holding of *Grunbeck* because  
23 the SIS, like per diem, does not *expressly limit* the amount of interest. As the *Grunbeck* court found,  
24 "The SIS itself, as distinguished from market forces, 'does not serve to. . .restrain' either the rate or  
25 amount of simple interest which may be obtained, since the lender remains free to compensate by  
26 increasing the simple interest rate. Thus, the SIS does not 'expressly' limit 'the rate or amount of  
27 interest.'" *Grunbeck*, 74 F.3d at 338, n. 6.  
28

1 In analyzing the preemption issue, the *Grunbeck* court looked to the  
2 legislative history and to the reason Section 501 of DIDMCA was enacted:

3 "The legislative aim in enacting section 501 focused on "state  
4 usury ceilings," [Citations] with particular emphasis on state usury  
5 laws which restrict interest rates to below-market levels and result  
6 in artificial disruptions in the supply of home-loan mortgage  
7 funds."

8 *Grunbeck, supra*, at 339.

9 It is undisputed by plaintiffs that the per diem statutes of California do  
10 not have any perceptible impact on the supply of home-loan mortgages. Therefore, the  
11 purpose for which DIDMCA was enacted is not at issue here.

12 Like the simple interest statutes in *Grunbeck*, the per diem statutes are  
13 consumer protection statutes. By placing the responsibility for any delays between funding and  
14 recording the deed on the lender, the California statutes protect the consumer from an "unseen" cost,  
15 in much the same way as did the simple interest statute in *Grunbeck*. Despite plaintiffs' contention  
16 that "the parties cannot contract around the per diem interest restriction as they could with the  
17 simple interest statute in *Grunbeck*" (Memorandum of Points and Authorities in Support of  
18 Plaintiffs' Motion for Preliminary Injunction, at page 17), nothing in the per diem interest statutes  
19 would prevent a lender from disclosing to and bargaining with borrowers for additional fees or  
20 charges that it might use to cover any alleged lost per diem interest income and which would be fully  
21 disclosed to the borrower.

22 Additional guidance may be found in *Larsen v. Countrywide Home Loans,*  
23 *Inc.*, 2001 U.S. Dist. LEXIS 10023 (Ill. 2001). There, the plaintiffs were homeowners who paid off  
24 their mortgage early, on August 18, 2000. The lender, however, charged them interest for the entire  
25 month of August. The Larsens sued, alleging violation of an Illinois statute prohibiting lenders from  
26 charging interest for any period after payment of the principal. The court found that Congress did  
27 not mean for DIDMCA to preempt all interest charges since interest charges that constitute  
28 prepayment penalties fall outside the scope of the Act. The *Larsen* court noted that other courts have  
found that state statutes regulating the computation of interest on federally insured loans are not

1 preempted by federal law, citing *Grunbeck*. The court in *Larsen* specifically declined to interpret the  
 2 term "rate or amount of interest" so liberally as to preempt to *any* state law that has an effect on how  
 3 much interest a borrower must pay. *Larsen* at 3. Yet, that is precisely the gist of plaintiff's  
 4 argument. See Plaintiff's Memorandum in Support of Plaintiff's Motion for Preliminary Injunction  
 5 at 15. As in *Grunbeck* and as followed in *Larsen*, such an argument must be rejected.

#### 6 **4. DIDMCA Also Provides An Exception For "Other Charges"**

7 Alternatively, the very statute so relied on by NCMC does in fact contain an  
 8 exception under which this court may conclude that California's per diem statute could qualify.  
 9 Subsection (b)(4) of 12 U.S.C. § 1735f-7a (of DIDMCA) provides as follows:

10 "At any time after the date of enactment of this Act (enacted  
 11 March 31, 1980), any state may adopt a provision of law placing  
 12 limitations on discount points or *such other charges* on any loan,  
 13 mortgage, credit sale, or advance described in subsection (a)(1)."  
 (emphasis added)

14 Whether the per diem charges governed by subdivision (o) of section 50204 of  
 15 the California statute may be considered "other charges" under DIDMCA, such that California may  
 16 limit them, is a question of first impression for this Court. Because the moneys charged to the  
 17 borrower are before he has yet to receive the benefit of his bargain, they may be classified as charges  
 18 rather than interest.

19 Plaintiff's claim that the California per diem statute is preempted by DIDMCA must,  
 20 therefore, fail. The plaintiff provides scant case authority in the face of the well-reasoned *Grunbeck*  
 21 appellate case. The plain reading of the California statute shows no language *expressly limiting* the  
 22 amount or rate of interest being charged. And, the legislative aim of DIDMCA (to prevent  
 23 disruption in the supply of home mortgage loans) is not frustrated by California's application of the  
 24 per diem statute.

25 Although plaintiffs will seek to convince the court that DIDMCA preempts California  
 26 per diem interest statutes, in reality there is no case law anywhere in the nation that so holds. The  
 27 statutes at issue do not encroach on the narrow field that DIDMCA preempts, and there is no  
 28 legitimate policy need for this court to erase from California books a statute that the state legislature

1 considered appropriate for the protection of consumer/borrowers.

2 **III. THE BALANCE OF EQUITIES TIPS AGAINST ISSUANCE OF A**  
3 **PRELIMINARY INJUNCTION**

4 **A. Plaintiffs Will Not Be Irreparably Harmed If The Commissioner Is Not**  
5 **Enjoined**

6 Plaintiffs will not be irreparably harmed if the Commissioner is not enjoined because  
7 (1) Plaintiffs' alleged audit costs are unsupported and based on inflated loan numbers; and (2)  
8 Plaintiffs will not lose significant revenue by having to charge per diem interest as required by the  
9 CRMLA.

10 The Commissioner also contests plaintiffs' claim that the audit demanded by the  
11 Commissioner would cost \$4,000,000. The number of loans NCMC has made in California since  
12 August 2000 is unsubstantiated. A review of the Loan Reports filed by NCMC for calendar years  
13 2000, 2001, and 2002 reveal that from August 2000 to December 2000, NCMC originated 719 loans;  
14 from January 2001 to December 2001, NCMC originated 6,846 loans; and from January 2002 to  
15 December 2002, NCMC originated 54,807 loans. This would make NCMC's loan totals for 2000,  
16 2001 and 2002 equal to 62,372. In addition, from August 2000 to December 2002, NCMC brokered  
17 35,476 loans. Even assuming that NCMC is including brokered loans in its total, this would make  
18 NCMC's loan totals for August 2000 through December 2002 equal to 97,848, not the 150,000 to  
19 180,000 loans NCMC claims. Burns Decl. ¶ 9.

20 Finally, NCMC would not lose significant revenue by having to comply with  
21 California Financial Code section 50204(o). As early as July 2001, NCMC stated in correspondence  
22 to the Department in response to a prior regulatory examination, that it understood the requirement  
23 that it not charge interest more than one day prior to the date of recording of the deed of trust.  
24 Moreover, while the August 2002 regulatory examination found approximately a 26% rate of per  
25 diem interest overcharges for loans made during the examination period, a significant number when  
26 dealing with consumer protection, it is not a number that supports plaintiffs' claim of substantial  
27 losses if it is not allowed to charge interest as it deems fit during the pendency of this action. Cherry  
28 Decl., ¶ 4 and Exhibit 1 thereto.



1           **B.       The Public Will Be Harmed During the Pendency Of This Matter By**  
2           **Granting The Preliminary Injunction**

3           The public will suffer harm if the preliminary injunction is granted because the  
4 CRMLA offers the only effective protection for consumers with respect to the lending and servicing  
5 of NCMC.

6           Plaintiffs argue that no harm will be suffered, because as a matter of law, if the area  
7 has been expressly preempted, there can be no harm. Plaintiffs cite to *Trans World Airlines, Inc. v.*  
8 *Mattox*, 897 F.2d 773 (5<sup>th</sup> Cir. 1990) in support of this proposition. However, Congress did not  
9 expressly preempt *any law* with respect to operating subsidiaries. As such, plaintiffs cite to *Trans*  
10 *World Airlines* is inapposite to this case.

11           While the OCC may regulate plaintiffs during the pendency of this action, it is clear  
12 that such regulation does not tip in favor of consumer protection. Also, plaintiffs' offer regarding  
13 how they would make the public whole at a later date when the CRMLA is upheld (refunds for  
14 overcharged per diem that do not even include interest) ignores the various other provisions of the  
15 CRMLA that exist for the publics' protection. *See* footnote 3 above. Thus, consumers will not be  
16 protected during the pendency of this matter.

17           **IV.     PREEMPTION, IF FOUND, COULD ONLY BE APPLIED TO LENDING ACTIVITY**  
18           **ENGAGED IN BY NCMC AFTER AUGUST 1, 2001**

19           Assuming for purposes of this argument only that preemption were found, it is presumed that  
20 preemption may not retroactively applied. *See Scott v. Boos*, 215 F.3d 940, 943 (9<sup>th</sup> Cir. 2000) citing  
21 *Landgraf v. USI Film*, 511 U.S. 244 (1994). “[C]ongressional enactments and administrative rules  
22 will not be construed to have retroactive effect unless their language requires this result.” *Landgraf*,  
23 511 U.S. at 272 (cite omitted).

24           The operating subsidiary preemption rule, 12 C.F.R. section 7.4006, was not promulgated by  
25 the OCC until July 2, 2001, and had an express effective date of August 1, 2001. Thus, under the  
26 rules of statutory construction set forth in *Landgraf*, federal preemption of the CRMLA, if found by  
27  
28

1 this court, would only apply from August 1, 2001 forward because 12 C.F.R. section 7.4006 has no  
2 retroactive application.<sup>18</sup>

3 The *Landgraf* case states that “when a case implicates a federal statute enacted after the  
4 events in suit, the court’s first task is to determine whether Congress has expressly prescribed the  
5 statute’s proper reach. If Congress has done so, there is no need to resort to judicial default rules. If  
6 the statute has no express command, the court must determine whether the new statute would have  
7 retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a  
8 party’s liability for past conduct, or impose new duties with respect to transactions already  
9 completed. If the statute would operate retroactively, our traditional presumption teaches that it does  
10 not govern absent clear congressional intent favoring such result.” *Id.* at 280.

11 Because the OCC specifically prescribed the preemption rule to become effective August 1,  
12 2001 there is no need to look at the second prong in *Landgraf* to determine that the rule is not to be  
13 applied retroactively.

14 Accordingly, were the court to consider issuing a preliminary injunction based upon federal  
15 preemption of the CRMLA, it should have no effect on the conduct of NCMC prior to August 1,  
16 2002. Accordingly, the Commissioner must be allowed to assert his jurisdiction under the CRMLA,  
17 including revocation of licenses, for conduct that occurred prior to that date.

## 18 **V. NATIONAL CITY BANK HAS FAILED TO SHOW ANY VIOLATION OF ITS** 19 **RIGHTS**

20 In addition to the other arguments set forth herein, plaintiff National City Bank has failed to  
21 show that any of its constitutional or statutory rights have been violated. National City Bank bases  
22 its attack on the statutes in question -- the CRMLA, and Civil Code Section 2948.5 -- on the premise  
23 that they are unconstitutional *as applied to* it. The Commissioner has never attempted to enforce any  
24 California laws relating to National City Bank. The only administrative actions in question being  
25 brought by the Commissioner are solely against NCMC, not against National City Bank.

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26  
27 <sup>18</sup> The rule of statutory construction set forth in *Landgraf* to determine whether a statute should be applied retroactively  
28 was followed by the Eastern District in *Mannat v. United States*, 951 F. Supp. 172 (E.D. CA 1996).

1 Plaintiff's failure to show any attempt by the Commissioner to enforce the laws as to  
2 National City Bank demonstrates that National City Bank lacks standing to bring this action. In *San*  
3 *Diego Gun Rights Committee v. Reno*, 98 F.3d 1121, 1126 (9<sup>th</sup> Cir. 1996), the court affirmed the  
4 dismissal of an action where plaintiffs had not been charged with any violations of the 1994  
5 amendment to the federal Gun Control Act, yet alleged that they wished and intended to engage in  
6 conduct prohibited by the Act. *Id.* at 1124.

7 Drawing heavily on the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S.  
8 555 (1992), the court noted the following requirements for standing to sue in federal actions:

9 "[P]laintiffs bear the burden of establishing their standing to sue. . . . To do so,  
10 they must demonstrate three elements which constitute the "irreducible  
11 constitutional minimum" of Article III standing. . . . First, plaintiffs must have  
12 suffered an "injury-in-fact" to a legally protected interest that is both "concrete  
13 and particularized" and "actual and imminent," as opposed to "'conjectural' or  
14 'hypothetical.'" Second, there must be a causal connection between their injury  
15 and conduct complained of. Third, it must be "likely"—not merely  
16 "speculative"—that their injury will be "redressed by a favorable decision.  
17 (quotations as in original, citations omitted.) *San Diego Gun Rights Committee* at  
18 1126.

19 National City Bank cannot demonstrate that it has suffered an "injury-in-fact" to a legally  
20 protected interest. The only action taken by the Commissioner has been against NCMC, a separate  
21 and distinct legal entity that sought licensure with him and is failing to comply with the California  
22 law. Although National City Bank is the parent corporation, as set forth more fully in Section II  
23 above, it is isolated from any regulatory liabilities incurred by NCMC by settled principals of  
24 corporate law relating to parents and their subsidiaries. Second, there is no injury to National City  
25 Bank other than the alleged injury claimed by NCMC. Finally, because there is no injury to  
26 National City Bank, there is no redress that this Court could provide even in a favorable decision to  
27 NCMC. Because standing issues may be properly raised at any time, the Commissioner's  
28 respectfully requests that the motion for preliminary injunction, at least as to plaintiff National City  
Bank, be denied on the basis that National City Bank lacks the necessary standing to bring such an  
action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

**CONCLUSION**

For the foregoing reasons, plaintiffs have not shown a likelihood of success sufficient to warrant the issuance of a preliminary injunction and they have failed to prove they will suffer irreparable harm if required to comply with the CRMLA. Further, plaintiff National City Bank lacks standing to bring this action. Accordingly, the Court should deny plaintiffs' request for preliminary injunction.

Should the Court believe that preemption applies pursuant to 12 C.F.R. section 7.4006, there is no question but that the OCC regulation was not effective until August 2001. Therefore, preemption could have no bearing on the actions taken by the Commissioner prior to the effective date. As a result, any injunction issued should only restrict acts occurring after August 2001, and no preliminary injunction should apply to any revocation proceeding instituted by the Commissioner pursuant to his statutory and/or regulatory authority regarding conduct by plaintiffs prior to the effective date of the OCC regulation.

Defendant respectfully requests this Court deny Plaintiffs' Motion for a Preliminary Injunction in its entirety, or, in the alternative, grant the limited relief requested above.

Dated: April 21, 2003

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